IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 4TH JANUARY 2007 / 14TH PAUSHA 1928

CRL.A.No. 1526 of 2006(C)

SC.92/2001 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

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APPELLANT: ACCUSED

ASOKAN S/O.RAMAKRISHNAN,C.NO.3624,
CENTRAL PRISON, KANNUR.

BY ADV. VINEETHA PRASANNAN(STATE BRIEF)

RESPONDENTS: COMPLAINANT & STATE

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1. STATE OF KERALA,REPRESENTED BY
EXCISE INSPECTOR,EXCISE RANGE OFFICE,
SULTHAN BATHERY.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, COCHIN.

BY PUBLIC PROSECUTORSRI. C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 1526 OF 2006

Dated this the 4th day of January, 2007

JUDGMENT

The appellant is the accused in Sessions Case No. 92 of 2001 on the file of the Additional Sessions Court (Adhoc) II, Kalpetta. He faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant was that on 22.9.1999 while PW.1, the Preventive Officer of Sulthan Bathery Excise Range was on patrol duty, he saw the appellant carrying 25 packets of Karnataka made arrack without any permit or licence under the provisions of the Abkari Act. To prove the case against the appellant, the prosecution examined PWs.1 to 7 and produced Exts.P1 to P7 as well as MOs.1 to 3. No oral or documentary evidence was adduced on the side of the defence. The appellant when questioned under Section 313 Cr.P.C. denied the allegations levelled against him and stated that the case was foisted against him due to the instigation of a nearby toddy shop owner against whom the appellant and others had filed a complaint for selling illicit toddy. However, relying on the prosecution evidence, the trial court found the

appellant guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo simple imprisonment for a period of five years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one year. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel for the appellant raised two points before this Court : (i) the evidence adduced by the prosecution is not sufficient to prove that the appellant committed offence punishable under Section 55(a) of the Abkari Act as all the witnesses were excise officials and (ii) even if the evidence of the prosecution witnesses is accepted, the appellant is not liable to be convicted under Section 55(a) of the Abkari Act as the prosecution failed to prove that the appellant was found in possession of the contraband articles in connection with export, import, transport or transit. To substantiate his contention, learned counsel relied on the decisions of this Court reported in **Purushan v. State of Kerala, 2002(2) K.L.T. 661**, **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and

Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D.(Cri.) 631.

5. PW.1 was the preventive officer who detected the crime. He stated that while he was on patrol duty on 22.9.1999 along with PWs.2 and 3, the appellant was found carrying a plastic cover containing 25 packets of arrack of 100 ml. each. He further stated that he arrested the appellant at the spot as per Ext.P1 arrest memo and took the contents of two packets as sample for chemical analysis and seized the remaining 23 packets and the empty packets as per Ext.P2 seizure mahazar in the presence of PWs.4 and 5. This witness further stated that the appellant was produced before the court on the next day and the contraband articles along with the sample were produced before the court on 28.9.1999.

6. The evidence of PWs.2 and 3 corroborates with the version given by PW.1. They also stated that they had accompanied PW.1 on 22.9.1999 on patrol duty and had seen the appellant carrying a plastic cover and that on questioning the appellant, it was revealed that the plastic cover contained 25 packets of arrack. PWs.4 and 5 were examined to prove Ext.P2 seizure mahazar. Even though these witnesses did not fully support the prosecution case, they admitted their signature in Ext.P2 seizure mahazar. PW.7 who was the Excise Inspector of Sulthan Bathery Excise

Range stated that on 22.9.1999 itself the appellant and the seized articles were entrusted with him and he produced the appellant before the court on the next day. Ext.P6 is the chemical analysis report which shows that the sample contained ethyl alcohol. Considering the evidence given by these witnesses, it can be seen that the trial court was justified in accepting their evidence. Hence, the first contention of the learned counsel is not tenable.

7. With regard to the second contention, it is seen that as per the evidence of PWs.1 to 3, the appellant was seen in possession of 25 packets of arrack without any permit or licence as per the provisions of the Abkari Act. But as per the principles laid down in the decisions referred to above, to attract an offence under Section 55(a) of the Abkari Act, it should be proved that the contraband articles found in the possession of the accused were in connection with import, export, transport or transit. In the decision reported in **Purushan v. State of Kerala, 2002(2) K.L.T. 661**, this Court held that **"the word `possesses' appearing in S. 55(a) comes in the context of the preceding words `imports, exports and transports`. What is contemplated there is possession in the course of the said activities."** In **Surendran v. Excise Inspector, 2004(1) K.L.T. 404**, a Division Bench of this Court held as follows:

> "..... Thus, it appears that the case shall fall within the ambit of S.55(a) only when a person is found to be in possession of liquor in the course of import, export, transport or transit of the goods. In case the possession is merely with the knowledge of the goods having been illegally imported or manufactured, the case would fall within the mischief of S.58."

The same view was followed in the decision reported in **Sudhepan @ Aniyan v. State of Kerala,2005(2) K.L.D.(Cri.) 631** wherein this Court held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that such possession was incidental or in connection with export, import, transport or transit of liquor.

8. Even if the evidence of PWs.1 to 3 is accepted, the prosecution has no case that the appellant was in possession of the contraband articles in connection with export, import, transport or transit. The action of the appellant would, therefore, attract Section 58 of the Abkari Act. Accordingly, the conviction entered against the appellant under Section 55 (a) of the Abkari Act and the sentence awarded are set aside. The appellant is convicted under Section 58 of the Abkari Act and he is sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The appellant is

also entitled to the benefit of Section 428 Cr.P.C.

The Crl. Appeal is allowed to the extent indicated above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.1526/2006

JUDGMENT

4TH JANUARY, 2006